

134. The only relay services issues to be addressed and decided in this proceeding are the funding mechanisms for KRSI and whether to direct the KUSF administrator to collect and distribute these funds. Most of the parties assert that KRSI is a part of universal service and should be funded on the same basis as the KUSF generally. The funding mechanism should be a percentage surcharge on all retail telecommunications service revenues. (SWBT Post-Hearing Brief at 25-26; Rhinehart, Tr. at 3118-86; Lammers, Tr. at 2966-6).

135. To ensure the competitive neutrality of future funding of KRC operations under the State Act, the Commission changes the assessment base for relay services to become an assessment on the retail revenues of all present and future intrastate telecommunications services providers in Kansas. SWBT and Sprint/United propose that KRSI be included in the KUSF. (Harper, Tr. at 2633-45). The economies of administration on a common or centralized basis seem apparent. The Commission finds that these funds shall be collected by the KUSF administrator as part of the KUSF assessment and paid out to KRSI for the ongoing operational support of both KRSI and the KRC.

136. The telecommunications equipment provisioning requirements of persons with hearing and visual impediments and persons with other special needs, are addressed in a separate proceeding, Docket No. 194,283-U (96-GIMT-435-MIS). Issues such as the size of the fund and the type(s) of equipment to be provided are part of that docket. However, the assessment methodology as well as the collection

and distribution of funds for the Telecommunications Access Program (TAP) Fund⁵ should be part of the KUSF to gain the advantages and efficiencies of common, central administration.

137. The Commission finds that the funding for TAP shall be collected by the KUSF administrator as part of the KUSF and shall be distributed to the agent or designee of the TAP Fund as determined and prescribed in Docket No. 194,283-U (96-GIMT-435-MIS).

138. The KUSF administrator will keep separate accounting records for the various funds. Distribution of funds shall be made in the following priority: KRSL, TAP, Lifeline, and Universal Service. The Commission shall be notified of adjustments in the assessment percentages.

D. FORM OF REGULATION /SELECTION OF REGULATORY PLAN

139. Section 6 of the State Act requires that "each local exchange carrier shall file a regulatory reform plan at the same time as it files the network infrastructure plan." As part of the regulatory plan, LECs may elect traditional rate of return regulation or price cap regulation. Carriers that elect price cap regulation shall be exempt from rate base, rate of return and earnings regulation. Infrastructure plans must demonstrate a LEC's ability to comply on an ongoing basis with quality of service standards the Commission will adopt no later than January 1, 1997. If the Commission finds, after a hearing, that a carrier subject to price cap regulation

⁵ The Telecommunications Access Program (TAP) replaced the former Disabled Equipment Acquisition (DEA) Fund in Docket No. 194,283-U.

violated minimum quality of service standards, the Commission may require the carrier to resume rate of return regulation. (HB 2728 § 6(a)(b)). The Commission directs Staff to review the election and infrastructure plans submitted by the LECs and review the applicant's request for either price cap or rate of return regulation in an expedited manner. The Commission retains its statutory requirement that rates be just and reasonable for carriers electing rate base rate of return regulation.

1. PRICE CAP BASKETS

a. COMPETITIVELY FLEXIBLE PRICING

140. A review of the evidence of record, the Federal Act and the State Act indicate there is a need for pricing flexibility by a LEC faced with a competitive local service provider or ALEC. SWBT indicated general agreement with Staff's range of rate-fixed and range of rate-flexible pricing, but suggested the latter does not go far enough. (SWBT Post-Hearing Brief at 11). Sprint/United recommended range of rate pricing flexibility within Basket Three. (Sprint/United Post-Hearing Brief at 2). These and other variations on the range of rate pricing plans are the reasons the Commission has decided to rename the pricing flexibility plan "Competitively Flexible Pricing" to avoid confusion. The Competitively Flexible Pricing plan combines range of rate-fixed, range of rate-flexible, as well as other comments and suggestions for change, revision or replacement. As compared to Staff's plan, the Competitive Sub-Basket provides greater flexibility to the LEC while simultaneously providing protection against cross-subsidization of competitive service losses or price reductions. This plan allows effective responses by competing firms within

the telecommunications industry without disturbing the balance between consumer interests and competing providers. In determining this formula, the Commission has balanced the public policy goals of encouraging efficiency and promoting investment in a quality, advanced telecommunications network in the state of Kansas. The Competitively Flexible Pricing plan would function as follows:

(1) Basket One

141. Basket One shall contain rates for basic telecommunications services which will remain unchanged until the year 2000, except for rate changes authorized by the Commission. (HB 2728 § 6(g)). In the event a competitor enters a local market and the existing range of prices is constrictive to the incumbent provider for the purpose of meeting competitor pricing, the LEC may petition the Commission for additional price flexibility within that exchange without the necessity of maintaining averaged rates for all similarly situated exchanges. This relief is only applicable for lowering the rates, which must remain above incremental costs and meet an imputation test as appropriate. Rates within all other exchanges may not be increased for the purpose of offsetting potential revenue losses in the competitive exchange(s). Determinations will be made on a case-by-case basis.

142. An exception to the Basket One price cap for single line residence and single line business (until January 1, 2000, as set out in § 6(g) of the Kansas Act) shall be the reclassification of an exchange from one rate group to another based upon growth or decline in the number of telephone access lines. Pursuant to SWBT's Local Exchange Tariff (Section 1.3 Application of Rates, Paragraph 1.3.8 Classification

of Exchanges), rates for local exchange services are based on the number of exchange access arrangements (EAAs) within the primary service area of an exchange or zone.

143. When an exchange or zone consistently exceeds the number of EAAs for the assigned rate group classification (over a minimum period of twelve (12) months or has remained above the range by two percent for six (6) months or more), SWBT shall inform the Commission and file amended tariffs for the purpose of regrouping the exchange(s). Conversely, should the number of EAAs in an exchange decline and remain consistently below the EAA level for the assigned rate group classification over a similar period of time, SWBT shall initiate action to regroup the exchange(s) downward. Access lines acquired for resale by an ALEC shall not be counted toward the total EAAs within an exchange or zone until connected for a subscriber's use. Regrouping will be done in a manner consistent with that employed prior to price cap regulation.

(2) Basket Two

144. Price cap adjustments are not applicable to switched access services. Prices are subject to reduction to match interstate rate levels. (HB 2728 §§ 6(c) and 6(e))

(3) Basket Three

145. Basket Three will contain rates for multi-line business and for services which are optional or more competitive in nature. The price cap will be adjusted annually after December 31, 1997. (HB 2728 § 6(i)) All Basket Three services shall be subject to a broader, less regulatory treatment when competition enters a local

market and the existing prices are constrictive to the incumbent provider for the purpose of meeting a competitor's prices.

146. Section 6(p) of the State Act grants the Commission discretion to price deregulate within an exchange area, or on a statewide basis, any individual service or service category upon a finding that there is a telecommunications carrier or an alternative provider providing a comparable product or service, considering both function and price, in that exchange area.

147. A variety of factors determine when competition within a local exchange occurs. They include: the number and type of providers, comparable products and/or substitutable services, and customer choice of providers and/or services. Once competition exists, a LEC may petition for treatment of specific service(s) within the exchange to be moved into a Competitive Sub-Basket. Prices of these services are subject to a price cap and price floor which may change based upon an adjustment factor and applicable offset for the sub-basket as determined separately in this proceeding.

148. Within the Competitive Sub-Basket, the LEC will have additional pricing flexibility within the competitive exchange without the necessity of maintaining averaged rates for all other customers within that same exchange. Rates for the same services for other customers within the same exchange may be increased to offset the potential loss of revenue resulting from competitive pricing in any other location within the same exchange. However, rates for services for customers from other non-competitive exchanges or services may not be increased

to offset revenue losses that may result from competitive pricing in competitive exchanges. The decreased rates must remain above incremental cost as well as appropriate imputation within this Competitive Sub-Basket.

149. When the Commission determines that services and/or an exchange are so competitive that the market can determine prices that are not too high without the need for price limits or other regulatory safeguards, then the prices will be deregulated.

b. SHOULD UNBUNDLED/WHOLESALE SERVICE REQUIRE PRICE CAPS

150. AT&T states that in the market for basic network functions, the LECs currently have market power and will for the foreseeable future. Access services and resold local services fall into that market. It is AT&T's position that the market for basic network functions, including services that are resold, will require price cap regulation. (Rhinehart, Tr. at 3118-32). The Commission finds that it is not necessary to provide price cap regulation for "unbundled" and/or "wholesale" prices.

2. PRICE CAP FACTORS

a. INFLATION FACTOR/PRICE CAP ADJUSTMENT FORMULA

151. The PCI calculated for each category (basket or sub-basket) would apply to the weighted average price of the elements within the category, not to each individual element. It is this provision in the mechanism that allows the LEC to have a certain amount of pricing flexibility. Beginning on March 1, 1997, a new price index would be calculated once a year, based on the percentage change in

GDPPI over the previous year offset by "X" and "Z" factors. (Rhinehart, Tr. at 3118-34). The percentage change in the PCI is GDPPI minus "X" plus or minus an additional adjustment for "Z". (Rearden, Tr. at 2867-6).

152. There is general agreement among the parties on the use of the price cap formula of the GDPPI chain-weighted (GDPPI-CW) as the basic inflation index for Basket One. (Tr. at 1795). The chain-weighted index is recommended because the fixed weight index is based on spending patterns from a base period, and often referred to a market basket approach. As such, the fixed market basket is unable to reflect either new products or the substitution between products as rapidly as a chain-weighted index. The fixed weight index is likely to be discontinued as a published price index series in the year 2000. (Van Pelt, Tr. at 2251-5). The Commission agrees with SWBT witness Dr. Van Pelt that the GDPPI-CW is a more appropriate mechanism to incorporate into the price cap formula than a fixed weighting system. (Van Pelt, Tr. at 2251-5). Therefore, the Commission finds that the GDPPI-CW shall be the basic inflation index for Basket One.

153. SWBT proposes that the CPILFE is the appropriate index to be used as the basis for a PCI applicable to Basket Three services. (Van Pelt, Tr. at 2251-3). Based on the evidence of record the Commission finds that the price cap formula for Basket Three should be GDPPI-CW. (Rearden, Tr. at 2867-8). This index has several advantages. It is widely used, and it is a relatively stable index, since it incorporates all final goods produced within U.S. Boundaries. Although SWBT witnesses Dr. Weisman, Dr. Van Pelt and Mr. Brown offer output market reasons to

justify the CPILFE as the inflation factor for Basket Three, no evidence was presented that indicates costs change differently between Baskets One and Three. The Commission was not persuaded by SWBT's position that a consumer price index (CPI) be used for Basket Three. The Commission has provided the opportunity for pricing flexibility as discussed at length within this Order. Additional pricing flexibility through the use of the CPILFE as the inflation factor is unnecessary. The Commission finds there is no compelling justification for the use of different inflation factors for Baskets One and Three.

b. PRODUCTIVITY FACTOR

154. The parties varied widely in their recommendations concerning an appropriate productivity factor, between 1.25 percent as proposed by SWBT and Sprint/United⁶ and 5.3 percent as proposed by Staff, CURB, and other parties. Concerns were expressed by some of the parties for any proposal of extremely low, or even no, productivity offset factors. (Rhinehart, Tr. at 3118-87; MCI Post-Hearing Brief at 23).

155. Many other states have already addressed the issue of TFP. The record demonstrates that a nationwide average of "indexed price cap states" TFP approximates 2.6 percent. (Weisman, Tr. at 2060-50).

156. The FCC has incorporated a stretch factor of 0.5 percent in the interstate LEC price cap plans. Further, KCTA proposed and supported the use of a stretch factor in order to both encourage the company to improve its overall efficiency and

⁶ Sprint/United originally proposed 50 percent of GDPPI. (Harper, Tr. at 2633-13).

also recognize the salutary effects of alternative regulation itself in stimulating additional productivity improvements. (Kravtin, Tr. at 2455-19). However, the Commission is not persuaded to adopt a stretch factor because there are differences between interstate and intrastate operations. The LECs have existing incentives to achieve the greatest possible efficiencies. Further, the Commission finds that a 3 percent TFP factor is appropriate on a total company basis. (Kravtin, Tr. at 2455-18). The Commission believes that a finding in the upper end of the range as supported in the record is warranted given the KCTA's testimony concerning the input price differential.

157. The Commission has also considered the infrastructure requirements set forth in Section 6(a) of the Kansas Act for the deployment of universal service capabilities by July 1, 1998, and enhanced universal service capabilities by July 1, 2001, when establishing the TFP near the mid-range of those proposed by the parties. The higher TFP rates were deemed inappropriate and prohibitive given the required investment in infrastructure.

158. In reaching its decision of the 3 percent TFP, the Commission has reviewed not only the proposed productivity factors but the evidence as a whole. In Mobil Exploration & Producing U.S. Inc. v. Kansas Corporation Comm'n, 258 Kan. 796, 843 (1995), the Kansas Supreme Court determined that achieving such a result based on a review of all the evidence is proper:

Under these circumstances, the KCC crafted a compromise after viewing the evidence as a whole. The KCC decided to create an incentive to drill infill wells and produce allowables in an orderly fashion. (Emphasis added). Id. at 845.

159. The Commission, after viewing the evidence as a whole, hereby determines that the 3 percent factor for Baskets One and Three is well within the range of the productivity factors presented in the record, and balances public policy goals of encouraging efficiency and promoting investment in a quality, advanced telecommunications network in the state of Kansas. The Commission believes that its flexible pricing plan meets the flexibility objectives. The Commission generally agrees with SWBT that additional flexibility be granted for Basket Three services and the lower the productivity offset the more pricing freedom for the price cap firm.

160. The Commission believes that the combination of a low productivity offset and lack of sub-categories would provide a degree of pricing flexibility that is not in the public interest. The Commission finds that sufficient pricing flexibility is provided under the Competitively Flexible Pricing plan as determined in paragraph No. 140 of this Order. The establishment of a TFP is not an appropriate tool to provide for pricing flexibility. The Commission does not find persuasive evidence in the record to support a different TFP for Basket Three services compared with Basket One services.

161. SWBT argued that competition will have a negative impact on productivity (SWBT Brief at 9), thus any productivity factor must be reduced by a competitive adjustment for the onset of competition. Further, SWBT witness Dr. Bernstein quantified the competition effect on the productivity factor to be .45 percent. (Bernstein Tr. at 2278-82). The Commission finds this argument unpersuasive. As competition emerges in a given industry, companies which have

previously enjoyed monopoly status are given incentive to increase efforts to improve efficiency. While the Commission realizes that SWBT has achieved efficiencies in the last several years, it is not persuaded that continued efficiencies are precluded due to the introduction of competition.

c. EXOGENOUS ADJUSTMENTS

162. As stated earlier, SWBT and Sprint/United have stated that exogenous cost adjustments are necessary. They agree that such adjustments should not be automatic, but be subject to a decision by the Commission upon the filing of a request for such an adjustment. Dr. Weisman testified that a failure to allow exogenous adjustments could undermine the Commission's commitment to price caps. (Weisman, Tr. at 2060-24). Dr. Weisman also stated "this would permit the Commission to review the specific facts and circumstances of any adjustment on a case-by-case basis in the future but would not require any binding determination by the Commission at the present time." (Weisman, Tr. at 2130).

163. The Commission finds that it should consider applications for exogenous adjustments on a case-by-case basis. Such requests should be infrequent and reserved for large dollar items. The Commission will take into consideration the general definition of exogenous in this record which is an event that is outside of the company's control and has a disproportionate effect on the industry so that its effect is not reflected by the price index. (Weisman, Tr. at 2060-22 to 2060-23; 2064). However, the Commission finds that it is premature to determine at this time which exogenous adjustments would be appropriate. The Commission further

finds that this mechanism should be symmetrical in application such that a negative or a positive adjustment could result if the facts support such a conclusion.

d. NEW SERVICES

164. This section deals with the treatment of "new" services within the pricing flexibility structure. One of SWBT's witnesses, Mr. Brown, stated that any new service introduced subsequent to the establishment of the initial price caps will likely be in response to competition and should therefore be price deregulated with individual customer pricing flexibility approved at the time they are introduced. (Brown, Tr. at 1840-19 to 1840-20). However, Mr. Brown also stated that the Commission has discretion to determine whether these services are competitive. (Brown, Tr. at 1886). This argument does not seem sufficiently compelling to support automatic price deregulation of all new service offerings. A more practical and consumer oriented approach seems to be for the LEC to petition for treatment of a new service as it deems appropriate and for the Commission to determine where in the Competitively Flexible Pricing structure that service should be placed. The Commission finds that any new service should be reviewed to determine its placement based on the merits and the competitive aspects of the service.

165. Mr. Brown also expressed the opinion that LECs should be allowed to repackage existing services into bundles or packages of services not previously offered which would be "new" services (Brown, Tr. at 1840-20) for regulatory oversight purposes. This position was not widely supported. Professor Alfred Kahn refuted this assumption in cross-examination stating if the only novelty is that one

takes existing services and bundles them in a way not previously bundled, that would seem to not qualify as a new service. (Kahn, Tr. at 2030).

166. Based on the evidence of record, the Commission finds that repackaged services should undergo the same scrutiny as new services to determine where they belong within the Competitively Flexible Pricing structure. The burden of proof as to whether or not a bundle of services previously offered separately or in any other combination constitutes a new service offering shall rest upon the LEC's ability to demonstrate the uniqueness of the new bundle/package. A "new service" is one which is introduced subsequent to the establishment of a company's price cap plan. Each application/petition filed by the LEC for placement of new or repackaged services will be considered on a case-by-case-basis and the Commission will determine after an appropriate proceeding the proper treatment of that new or repackaged service within the Competitively Flexible Pricing structure.

e. IMPUTATION

167. The Commission finds that requiring imputation on an individual service basis is consistent with the provisions of the State Act. Individual pricing plan imputation is preferred because it precludes a new service from being offered at retail rates which are below cost and established retail price based on LRIC costs plus imputed access price. Further, imputation on a service by service basis is necessary to prevent price squeezes. (AT&T Post-Hearing Brief at 22-23 citing Kravtin, Tr. at 2509-2510). The total service approach allows one or more services to be priced below cost while the toll service category remains above cost. When imputation is

distributed over all toll services instead of by specific service element, the potential to price anti-competitively is increased. The Commission's directive is for the continued application of the "stand alone" imputation methodology to protect potential competitors from inappropriate, below cost pricing. It also addresses the concerns raised by some of the parties.

168. To the extent pricing flexibility is provided for local exchange service, imputation for local services is a concern for the Commission. The Commission believes that competition in the local service market through unbundled elements is comparable to the long distance market. Therefore, the Commission will continue to consider applications on a case-by-case basis.

f. BYPASS

169. Staff and SWBT testimony agree that bypass of LEC access services should decrease imputed access prices. (Vining, Tr. at 2298-5; Rearden, Tr. at 2867-23).

170. SWBT proposes to use local switching MOUs to estimate bypass. The formula for bypass percentage on both ends of a call proffered by SWBT is (originating local switching MOU minus terminating local switching MOU) divided by the originating local switching MOU. (Vining, Tr. at 2298-18). The Commission agrees with Staff that this formula may not be valid for bypass on both originating and terminating ends of a call. (Rearden, Tr. at 2867-23). Therefore, the Commission orders use of a bypass adjustment when it is appropriate for any particular service being examined.

3. RATE OF RETURN REGULATION

171. Section 6(b) of the State Act requires that a local exchange carrier may elect traditional rate of return regulation or price cap regulation. Therefore, the Commission's policy with regard to rate of return will for the present remain unchanged. The companies retain the right to request rate increases while the Commission retains the right to investigate the rates of any company.

E. MISCELLANEOUS ISSUES/POSITIONS AND CONCLUSIONS

1. RURAL ENTRY GUIDELINES

172. Section 5(b) of the State Act requires the Commission "to adopt guidelines to ensure that all telecommunications carriers and local exchange carriers preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers."

173. The Commission, in accordance with the State and Federal Acts, affirms that preservation and enhancement of Universal Service is a primary concern. (HB 2728 § 5(b)). Competition may develop at a slower pace in rural areas than in urban locations, and the Commission recognizes that concern for continued availability of service is great in the rural areas of the state. To ensure continued service availability in all areas, the State Act designates incumbent local exchange carriers as "carriers of last resort." (HB 2728 § 10(a); Krehbiel, Tr. at 2528-40).

174. The Federal Act, in apparent recognition that the viability of competition in rural areas is not assured, exempts rural telephone companies from

requirements of the Federal Act which are essential prerequisites for competition. (See § 251(f)(1)). Loss of this exemption is triggered by a bona fide request for interconnection, services or network elements, and a state commission's determination that such a request is not unduly or economically burdensome, is technically feasible and is consistent with Section 254 of the Federal Act (preservation of Universal Service). (See § 251(f)(1)(A)(B); Mikesell, Tr. at 2589-10; Columbus and State Independent Alliance Post-Hearing Brief at 4).

175. Section 251(f)(2) of the Federal Act allows incumbent rural telephone companies to petition state commissions for suspension or modification of the interconnection requirements of Section 251(b) or (c). (Staff Brief at 24-27). Staff attached an Appendix to its Brief which enumerated the statutory requirements for rural entry. The Commission hereby adopts those guidelines for rural entry and it becomes Attachment "B" of this Order. Conditioning rural entry on these guidelines will help ensure universal service in rural areas.

176. The Commission further finds that in accordance with Section 5(c) of the State Act, any telecommunications carrier seeking to provide services in a rural telephone company area must be designated by the Commission as an "eligible telecommunications carrier" as defined in Section 214(e)(1) of the Federal Act. The Commission agrees with Staff that the standards should be applied on a case-by-case basis and each applicant must meet the requirements of K.S.A. 66-131.

177. Section 214(e)(4) of the Federal Act establishes the procedure which state commissions must follow to assure continued universal service if a carrier

wants to abandon service. The protection of the public safety and welfare, and assurance of the continued quality of telecommunications services, will be addressed in Docket No. 191,206-U. Further, the Commission has opened Docket No. 194,734-U to consider issues arising from the State Act. In that docket the Commission is addressing many issues such as customer notice and billing issues.

2. CUSTOMER INFORMATION

178. The LECs believe it is not appropriate to require incumbent LECs to provide in-depth information regarding a competitive LEC's services. However, it may be appropriate to provide specific information in the white pages regarding a competitive LEC, but not without a charge for additional listings. (Harper, Tr. at 2633-27).

179. SWBT proposes that incumbent LECs not be required to provide their customers' specific information regarding competitors' services or prices. The nature and extent of information a competitor chooses to provide to its customers is a business decision to be reached by the individual providers. (Mah, Tr. at 2261-4).

180. The Commission's role in providing general information to consumers regarding the expansion of competition could come in a variety of forms including news releases, brochures, etc. (Mah, Tr. at 2261-5).

181. Staff suggests that, at least during the initial stages of competition, consumers will continue to rely on telephone directories for consumer information and telecommunications services. Staff proposes that the Commission require LECs to list all certificated telecommunications service providers by name in their

directories. (Matson, Tr. at 2691-32). Staff also recommends that the LECs' standard directory information section include each company and the services each company provides.

182. The Commission finds a modification of the above proposals is reasonable. Due to the "static" nature of information published in an annual telephone directory and the anticipated "dynamic" status of competitors entering the local market throughout the year, Staff shall draft a generic notice which describes local competition and consumer rights, but does not list the competitive service providers. Upon approval and adoption by the Commission, this notice shall be published in the "call guide" pages of each directory produced by every telecommunications provider and/or affiliate. LECs must make directory advertising available to ALECs on a comparable and non-discriminatory basis. The LECs shall advise Staff of directory information due dates. Staff shall update the information as necessary.

3. BOUNDARY ISSUE

183. Staff recommended the Commission review the way LECs provide service across exchange boundaries to allow consumers greater choice and more competitive flexibility without requiring ALEC qualification. Staff proposed allowing service to ten subscriber access lines in a neighboring exchange as the limit, with requests or demand for service to greater numbers of customers functioning as the trigger which would require an investigation into the incumbent's competitive status outside its home territory. (Matson Tr. at 2691-29).

184. Some parties expressed concern and others commented on the implication of possible stranded investment. Columbus was specific that if one of its customers nearest to its service area boundary elects to receive local service from a neighboring provider, the investment Columbus has made to provide facilities to that customer's location may represent a significant stranded investment.

185. The Commission notes that the LECs have tariffs which contemplate service to a customer outside their service territory by agreement between the affected companies. Those tariffs require the customer to pay for construction of facilities beyond the LECs' existing plant at a fixed rate within the LECs' service territory, and at actual cost beyond the LECs' boundary. The Commission also notes that boundary change requests have been determined on a case-by-case basis. The Commission finds that the boundary change requests shall continue to be considered and determined on a case-by-case basis and denies Staff's proposal at this time.

4. SPRINT SPECTRUM'S ARGUMENT OF FEDERAL PREEMPTION

186. Sprint Spectrum argued that the Commission cannot impose the KUSF obligation on it and other providers of commercial mobile radio service because of the preemption mandated by Section 332(c)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 332(c)(3). This provision preempts the states from regulating rates charged by any commercial mobile service provider. (Sprint Spectrum Post-Hearing Brief at 2-3). Sprint Spectrum contended it should have no funding obligation.

187. The State Act and the Commission are not trying to regulate cellular/wireless rates or prices in any manner. However, the Federal Act expressly allows states to adopt their own universal service definition and funding mechanisms, as long as funding is provided by all telecommunications carriers on an equitable and non-discriminatory basis. (47 U.S.C. § 254(f)). Wireless Providers, both cellular and Personal Communications Service (PCS) Providers, are carriers under federal law. Carrier is defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio." (47 U.S.C. § 153(10)). Wireless/PCS Providers provide telecommunications service. Telecommunications service is defined as "the offering of telecommunications for a fee directly to the public." (47 U.S.C. § 153(46)). Wireless/PCS Providers are common carriers providing telecommunications service. State universal service fund assessments are authorized by the Federal Act. (See § 254(f)). Therefore, the Commission concludes that in accordance with state and federal law, Wireless/PCS Providers must contribute to the KUSF funding in an equitable and non-discriminatory manner as discussed in paragraph Nos. 109 and 110 of this Order.

5. WIRELESS PROVIDERS ARGUMENT: STATUTORY TERMS "EQUITABLE AND NON-DISCRIMINATORY" ARE NOT SYNONYMOUS WITH "EQUAL"

188. The Wireless Providers assert that the Legislature has given the Commission latitude to consider equitable factors in addition to equality of assessment in determining contribution for the KUSF. (Wireless Providers Post-Hearing Memorandum at 16-27).

189. The Wireless Providers allege that their rate of assessment should be lower than that imposed on the IXC's because wireless providers offer functionally equivalent services to those provided by LECs. (Wireless Providers Post-Hearing Memorandum at 18). The Wireless Providers assert that consumers can use either LEC service or cellular service to make the same telephone call. In contrast, IXC service is not a functional alternative to LEC service. This difference warrants a difference in the rate of assessment for the KUSF imposed on IXC's and Wireless Providers. (Wireless Providers Post-Hearing Memorandum at 18).

190. Further, the Wireless Providers allege that the rate of assessment to them should be smaller than the amount assessed to the IXC's because Wireless Providers will realize a much smaller savings from the reduction in intrastate access charges. The Wireless Providers state according to Staff estimates, the IXC's will realize a 30 percent reduction in the access charges paid in connection with providing intrastate long distance service. (Wireless Providers Post-Hearing Memorandum at 19 citing Lammers, Tr. 2966-17 to 2966-18).

191. The Wireless Providers also allege that their rate of assessment should be smaller than that of the IXC's because they will not use the network and infrastructure supported by the KUSF to the same extent as IXC's. The Wireless Providers argue that the LECs will enjoy the benefit of maintaining universal service on both the originating and terminating calls they carry in high cost areas. IXC's will similarly benefit because their residential service requires that local network and infrastructure for both ends of every intrastate long distance telephone

call. (Wireless Providers Post-Hearing Memorandum at 21 citing Lammers, Tr. at 3088).

192. In contrast, the benefit to cellular service providers from the creation and maintenance of infrastructure is qualitatively different. Cellular service providers have constructed and PCS providers are beginning to construct, at their own risk and expense, infrastructure and network to process whichever end of a telephone call involves a cellular customer. (Wireless Providers Post-Hearing Memorandum at 21 citing Lammers, Tr. at 3084).

193. HB 2728 requires "every telecommunications carrier, telecommunications public utility and wireless telecommunications service provider that provides intrastate telecommunications service to contribute to the KUSF on an equitable, non-discriminatory basis."

194. Black's Law Dictionary defines "equitable" as [j]ust; conformable to the principles of justice and right. (Black's Law Dictionary, at 279. Abridged Fifth Ed.). Equitable is also defined as Equitable does not necessarily mean "equal." In utilizing the term equitable to determine a telecommunications carrier's contribution, the Legislature was clearly stating the contribution may or may not be the same. The Legislature granted the Commission discretionary authority to set the contribution level on a basis the Commission determined was justified.

195. The Wireless Providers contend that this is not equitable in that it will require them to provide contributions for calls that do not touch the wireline network. For example, calls made from cellular to cellular do not utilize the

wireline network and should not be subject to the KUSF. However, the record does not indicate how much revenue arises solely from wireless to wireless calls which do not utilize a wireline network, nor is there any evidence that the value of wireless service can be sustained without the existence of the wireline network. The wireline network remains accessible and available for all wireless subscribers.

196. There is no dispute that wireless providers have benefitted for the past few years by providing service for calls that do use a wireline network but have not been providing support for universal service. Further, the Wireless Providers claim that they receive no benefit from the changes occurring as a result of competition. However, the August 8, 1996 FCC Interconnection Order, Docket No. 96-98, allows wireless carriers to negotiate interconnection agreements with LECs in the same manner as ALECs. Such agreements could substantially reduce the interconnection charges currently paid by cellular companies from around \$.03 to less than \$.005. (FCC Docket No. 96-98, ¶¶ 1041-1045; Staff Post-Hearing Brief at 28-29). Interconnection charges are in a State tariff, and interconnection agreements will require state commission approval. The Commission has looked at the totality of the circumstances in determining the level of contribution. Based on the evidence of record the Commission finds that it is equitable and non-discriminatory for the LECs, the telecommunications providers, and the Wireless Providers to contribute to the KUSF on the same basis, as an equal assessment based on intrastate retail revenues, because wireless providers are in a position to benefit from the changes occurring as a result of competition.⁶ The Commission concludes that the equal

assessment is equitable and non-discriminatory in accordance with state law. The Commission also recognizes that changes may provide compelling reasons for future revision to allow different treatment based upon developing criteria.

6. WHETHER THE STATE ACT (HB 2728) VIOLATES THE
FEDERAL TELECOMMUNICATIONS ACT OF 1996

197. CURB argues that HB 2728 violates the Federal Telecommunications Act of 1996. CURB argues HB 2728 provides reductions in access charge costs to competitors and raises local rates to preserve excessive profits of LECs, but it does not ensure that local service will "bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." (Ostrander, Tr. at 2684-2). CURB argues that HB 2728 focuses on deregulating monopoly carriers at the expense of residential and small business customers, rather than promoting a rational and economic solution to high access charges and an orderly transition to local competition. (Ostrander, Tr. at 2684-2).

198. The Kansas Supreme Court has expressly stated that, "[a] fundamental rule of statutory construction is that the intent of the legislature governs when the intent can be ascertained from the statute. In construing statutes, legislative intent is to be determined from a general consideration of the entire act. . . ." Steele v. City of Wichita, 250 Kan. 524, 529, 826 P.2d 1380 (1992), citing State v. Adee, 241 Kan. 825, 829, 740 P.2d 611 (1987).

199. The intent of the State Act is to "ensure that every Kansan will have access to a first class telecommunications infrastructure that provides excellent services at an affordable price; ensure that consumers throughout the state realize